STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2008
v	No. 277903 Oakland Circuit Court
TIMOTHY SMITH, Defendant-Appellant.	LC No. 2006-208650-FC

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

A jury convicted defendant of voluntary manslaughter, MCL 750.321, and the trial court sentenced him to 10 to 15 years' imprisonment. He appeals as of right. We affirm.

I. Basic Facts

Defendant was convicted of killing his 34-year-old live-in girlfriend in their Pontiac apartment on March 28, 2006. Defendant and the victim had dated since 1999, and had two children together, ages five and six at the time of trial. The victim also had a daughter, QE, from a prior marriage, who was age 13 at the time of trial. Defendant and the victim had a tumultuous and volatile relationship, with several incidents of domestic violence. Throughout the years, the victim had broken up with defendant on occasion, but would reconcile with him.

On the day before the victim's death, the victim and the children met defendant at his nephew's barbeque gathering in Pontiac. QE testified that defendant and the victim eventually began arguing, and defendant called the victim a derogatory name. At about 9:00 p.m., the family left the barbeque, returned to their apartment, and defendant and the victim resumed arguing. According to QE, defendant called the victim derogatory names and threatened to crack her head open and pop her neck, a threat that QE had overheard before. One of the victim's friends testified that she called the victim at about 9:00 p.m. and could hear defendant yelling angrily in the background. QE indicated that at about 9:30 p.m., the victim told the children to go to bed. At that time, the victim was lying on the bed wearing her work clothing, and defendant was sitting on the edge of the bed watching television with a liquor bottle nearby. At about 5:00 a.m., QE was awakened by a noise, went in the victim's bedroom, and saw the victim lying facedown on the bed, nude and unresponsive. Defendant was leaning over the victim, crying and screaming. QE directed her two younger siblings to leave the room and called 911.

Upon arrival, the Pontiac police and EMS observed that the victim had a dark ligature mark around her neck, and was cold and stiff, which indicated that she had been dead for several hours. The officers smelled alcohol on defendant, and noted that he was sobbing, yelling, and acting oddly. A cut or ripped portion of a telephone cord and coaxial cable were found near the bed. A medical examiner concluded that the victim's death was a homicide, caused by ligature strangulation. There was bruising around the victim's neck that formed a pattern of a ligature mark, and the ligature mark was consistent with the seized telephone cord being used to apply the force. QE testified that the phone cord was intact before the victim's death. Additional bruising on the victim's neck was caused by a separate application of force with a larger object, e.g., someone pressing one or both of their arms against her throat or holding her in a chokehold or headlock. In addition, there was bruising on the victim's lower lip, upper arms, shoulders, and chest, consistent with being hit, grabbed, struggling, and significant force being applied. The medical examiner opined that multiple injuries occurred before the ligature was applied and estimated the time of death in the early morning hours, possibly around midnight. Defendant was arrested for an outstanding domestic assault warrant, and later charged with first-degree premeditated murder.

The defense denied any wrongdoing and claimed that when defendant left the house during the early morning hours, he was in a "good mood" and later returned to find the victim.[1] Defendant's nephew testified that on March 27, 2006, defendant and the victim were both in a good mood while at the barbeque at his house, and neither appeared angry. On cross-examination, he admitted that he did not see the victim and defendant for most of the evening, and did not see them leave. Defendant's brother testified that on March 28, 2006, from 1:30 to 2:30 a.m., defendant was at his home, which is about a five or ten-minute drive, and defendant was in a good mood and did not appear angry, upset, or crying. On cross-examination, defendant's brother admitted that he and defendant used crack cocaine that evening. He also admitted that defendant has a temper, was jealous of the victim, and that defendant and the victim argued frequently.

II. Evidentiary Issues

Defendant argues that he is entitled to a new trial because the trial court erred in admitting evidence of "other acts" under MRE 404(b), and the victim's out-of-court statements under MRE 803(3). We disagree.

A. Background

Before trial, the prosecution filed notices and moved to admit evidence of defendant's acts of domestic violence against the victim, QE, and defendant's former girlfriend under MCL 768.27b or MRE 404(b). The prosecution sought to admit the evidence under MRE 404(b) as proof of defendant's common system, scheme, or plan for assaulting and controlling the females

[1] Police testimony indicated that there were no signs of forced entry, nothing was taken from the house, the victim was still wearing her jewelry, and there were no indications of a break-in or robbery. The medical examiner testified that there was no sign of sexual assault. A neighbor testified that there were no strangers in the area.

in his household. The prosecution also moved to admit evidence of the victim's prior statements made to others expressing her fear of defendant, relationship discord, and her contemplation of leaving him and moving out of state under MRE 803(3) and *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Defendant did not oppose the motions and the trial court summarily granted them. At trial, defendant objected to the acts of domestic violence involving his former girlfriend, and to some of the victim's prior statements that she feared defendant and needed to leave town because of him.

B. Standard of Review

Because defendant failed to object to the evidence of the prior acts of domestic violence against the victim and QE, and most of the victim's statements, we review those unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). With regard to the evidence of the prior acts against defendant's former girlfriend and the challenged statements made by the victim, we review the trial court's decision to admit the evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). If there is an underlying question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *Id.*

C. Analysis

1. Other Acts Against the Victim

At trial, the victim's sister, Sharmon Woods, testified that in the summer of 1999, the victim telephoned and asked her to come over. Woods could hear defendant cursing in the background and calling the victim derogatory names. When Woods and her husband arrived within five minutes, defendant had his hands around the victim's throat and the victim was struggling. Woods intervened and hit defendant to cause him to release the victim. Defendant unsuccessfully reached for a baseball bat. Woods's husband attempted to calm defendant, and defendant left. QE testified that in 1999 or 2000, defendant grabbed the victim's coat around her neck and pushed her against the wall, causing the victim to choke. Defendant told the victim that he was going to crack her head or "pop her neck." QE testified that in 2001, while the victim was pregnant with defendant's youngest child, defendant and the victim were arguing and defendant swung a baseball bat at the victim, attempting to hit her, as the victim ran for safety. QE observed defendant put his hands around the victim's neck about five or six times. The victim's niece observed an incident when defendant tried to hit the victim with a baseball bat after she had left defendant and returned to obtain her clothes. The victim's friend testified that in early 2006, defendant broke the victim's finger by bending it back while they were arguing.

The evidence of domestic violence against the victim was admissible under MCL 768.27b.[2] MCL 768.27b(1) provides, in relevant part, that "in a criminal action in which the

[2] Defendant contends that the evidence was inadmissible under MRE 404(b), and that any probative value was substantially outweighed by the danger of unfair prejudice. Defendant does not, however, address admissibility under MCL 768.27b.

defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant." The definition of "domestic violence" includes acts "[c]ausing or attempting to cause physical or mental harm to a family or household member" and "[p]lacing a family or household member in fear of physical or mental harm." MCL 768.27b(5)(a)(*i*) and (*ii*). "Family or household member" includes "[a]n individual with whom the person resides or has resided," "[a]n individual with whom the person has or has had a child in common," and "[a]n individual with whom the person has or has had a dating relationship." MCL 768.27b(5)(b)(*ii*)-(*iv*). All of the assaults at issue here involved acts of domestic violence against a family member and, therefore, were admissible under MCL 768.27b(1) to the extent they were relevant, and the probative of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The relevancy "threshold is minimal: 'any' tendency is sufficient probative force." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). The evidence assisted the jury in weighing and assessing credibility, particularly where defendant denied any wrongdoing and implied that a stranger entered the house and attacked the victim while he was at his brother's house. Further, defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a), and given his defense, the evidence was relevant to show motive, intent, and premeditation.[3] We therefore conclude that the evidence was relevant for purposes of MCL 768.27b(1).

Furthermore, the evidence was not inadmissible simply because the nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403. While the acts described were serious and incriminating, such characteristics are inherent in the underlying crimes for which defendant was accused. The danger that MRE 403 seeks to avoid is that of *unfair* prejudice, because, presumably, all evidence presented by the prosecution is prejudicial to the defendant to some degree. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). The probative value of the evidence was not substantially outweighed by its prejudicial effect.

2. Acts Against QE

QE testified that defendant inappropriately touched her on two occasions that made her feel uncomfortable. Defendant rubbed her left breast with his hand for a "medium" amount of time, and touched her "back part" with his hand. QE told the victim about the incidents, and the victim said that they were going to move when she received her "Section 8."

[3] The elements of first-degree premeditated murder are that the defendant killed the victim and that the killing was "willful, deliberate, and premeditated." MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Premeditation may be inferred from all the facts and circumstances, including the relationship between the parties, the circumstances of the killing itself, and a defendant's conduct before the murder. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

Defendant's acts against QE constituted an act of domestic violence on a family member for purposes of MCL 768.27b(1). "Domestic violence" means "[e]ngaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27b(5)(a)(*iv*). The evidence was probative of motive and premeditation because QE had told the victim about the incidents, and the victim responded by indicating that she intended to move away from defendant. While the probative value of defendant's act of touching QE, compared with the prejudicial effect of the evidence, presents a closer question, it does not rise to the level of a "clear or obvious" error, which is necessary to establish a plain error under *Carines*, *supra* at 763.

Furthermore, this evidence did not affect defendant's substantial rights considering that the remaining evidence against defendant was strong. Defendant and the victim had a volatile relationship leading before the victim's death, QE and officers testified that defendant was standing over the victim's lifeless body after the incident, the victim died by ligature strangulation, a cut phone cord was recovered from defendant and the victim's bedroom, and there was no evidence that an intruder had entered the house. In short, absent the testimony in question, the possibility of a different result would have been remote.

3. Other Acts against a Former Girlfriend

Monique Shelton testified that she and defendant dated and, at times, lived together. Shelton testified that in 1995, after she received her paycheck, defendant retrieved her from her father's house, carried her out of the house, took her back to their apartment, threw her on the bed, choked her to the point that she could not breathe, punched her, and took her money. In 1996, while Shelton was pregnant, Shelton was packing her belongings to leave when defendant brandished a shotgun and threatened to shoot her, and then pushed her down the stairs. In 1997, when Shelton was residing with a relative, defendant called and requested a meeting. Shelton agreed, but did not meet defendant. Later, defendant was driving his car and saw Shelton driving her car. Defendant raised his hand to form the shape of a gun. Defendant followed Shelton to his brother's house and after his brother told defendant that Shelton was not there, defendant entered through a window. Once inside, defendant grabbed Shelton around the neck, lifted her from the ground by the neck, and squeezed her neck. Defendant threw her against the wall, choked her, and punched her in the face multiple times with one hand while leaving the other around her neck. Defendant's brother intervened, but defendant was able to grab Shelton and choke her again. When defendant and his brother began fighting, Shelton left the apartment.

The trial court did not abuse its discretion in admitting the 1996 and 1997 acts against Shelton under MCL 768.27b. The acts constituted domestic violence against a family member. Further, the evidence was relevant to show defendant's controlling behavior against his girlfriends, to show how he reacted when a girlfriend left or threatened to leave him, and to show defendant's methodology for assaulting his girlfriends, which was similar to the victim's manner of death in this case. Additionally, the probative value of this evidence was not substantially outweighed by its prejudicial effect. With regard to the 1995 act, MCL 768.27b(4) provides that "[e]vidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice." Here, the trial court did not make a finding on the record that the act was admissible in the interest of justice. However, MCL 768.27b "does not limit or preclude the admission or

consideration of evidence under any other statute, rule of evidence, or case law," MCL 768.27b(3), and plaintiff also relied on MRE 404(b) as a basis for admitting the evidence.

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998), reh den 459 Mich 1203 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *Id.* at 75.

The prosecution offered the evidence to prove a common scheme or plan in doing an act, and to prove defendant's intent, which are proper purposes under MRE 404(b) (See prosecutor's notice.) As our Supreme Court explained in *People v Sabin* (*After Remand*), 463 Mich 43, 63; 614 NW2d 888 (2000), "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." See also *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). The *Sabin* Court noted that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Sabin*, *supra* at 64. "For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan." *Hine*, *supra* at 251; see also *Sabin*, *supra* at 64-65. But "distinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense." *Hine*, *supra* at 253, citing *Sabin, supra* at 65-66.

The evidence was not offered to show that defendant had a bad character. Rather, it was probative of defendant's common scheme, plan, or system of assaulting his girlfriends. In both the prior act and the charged crime, there was a concurrence of common features that defendant utilized against the women, including strangulation. The commonality of the circumstances of the other acts evidence and the charged crime are sufficiently similar that the jury could infer that defendant had a scheme, plan, or system in doing an act. Furthermore, the probative value of the evidence was not substantially outweighed by its prejudicial effect. MRE 403.

4. The Victim's Statements

At trial, defendant challenged as inadmissible hearsay testimony that the victim had stated that she was afraid of defendant and needed to move out of town because she believed that defendant was going to kill her and "messing with [her] baby."

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing and offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v*

Ivers, 459 Mich 320, 331; 587 NW2d 10 (1998). Under MRE 803(3), a statement of a declarant's "then existing state of mind, emotion, sensation, or physical condition" is not excluded by the hearsay rule. *People v Coy (After Remand)*, 258 Mich App 1, 14; 669 NW2d 831 (2003). "Statements of mental, emotional, and physical condition, offered to prove the truth of the statements, have generally been recognized as an exception to the hearsay rule because special reliability is provided by the spontaneous quality of the declarations when the declaration describes a condition presently existing at the time of the statement." *People v Moorer*, 262 Mich App 64, 68-69; 683 NW2d 736 (2004). Statements made by a declarant can also be admitted under MRE 803(3) if they relate to a then existing plan or intent. *Fisher*, *supra* at 450.

The victim's statements to witnesses that she feared defendant and needed to leave town were admissible under MRE 803(3), as statements of the victim's then existing state of mind and intent. Because defendant denied killing the victim, her fear and plan to leave him were relevant to show motive, intent, and premeditation. *Fisher*, *supra* at 450-451, 453. Moreover, the statements were not admitted for the truth of the matter asserted, i.e., that the defendant was actually going to kill the victim, but to demonstrate relationship discord, which is highly probative to show motive and intent. See *id.*; see also *People v Rotar*, 137 Mich App 540, 548-549; 357 NW2d 885 (1984). Further, although the statements were not favorable to defendant, he has not shown that their admission was unfairly prejudicial. The probative value of the statements was not substantially outweighed by the danger of unfair prejudice. MRE 403. Consequently, the trial court did not err in admitting the victim's statements.

III. Upward Departure

Defendant also contends that the trial court erred when it departed from the sentencing guidelines recommended sentence range of 43 to 86 months and sentenced him to 10 to 15 years' imprisonment for his voluntary manslaughter conviction. We disagree.

Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the calculated guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A court may depart from the appropriate sentence range only if it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 769.34(3). A court may not depart from the guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b).

Our Supreme Court has reiterated that the phrase "substantial and compelling" constitutes strong language intended only to apply in "exceptional cases." *Babcock, supra* at 257-258 (citation omitted). The reasons justifying departure should "keenly and irresistibly grab" the court's attention and be recognized as having "considerable worth" in determining the length of a sentence. *Id.* Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Id.* at 257, 273. This means that the facts considered must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

Whether a factor exists is reviewed for clear error on appeal. *Babcock, supra* at 265, 273. Whether a factor is objective and verifiable is subject to review de novo. *Id.* The trial court's determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the minimum sentence range is reviewed for an abuse of discretion. *Id.* at 265, 274; see also *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock, supra* at 274.

In this case, the trial court stated its reasons for departure on the record:

> This case warrants an upward departure from sentencing guidelines. Factors that are not taken into consideration and consider - considering the guideline range or are not given adequate weight. These Factors in this Court's view provide substantial and compelling reasons to depart upward[] from the guidelines.
>
> First, there are multiple prior assaults on girlfriends. In 1999, you strangled [the victim] on the front lawn of your residence. In 2000, you again strangled her and prevented her from leaving the residence. In 2001, you swung a baseball bat at [the victim] while she was pregnant. In 2006, you broke her finger by bending it backwards. You verbally and physically, not only victimized but terrorized [the victim] for years. You are a menace to society. You are a threat to any woman you have a relationship with.
>
> The Court heard testimony from Monique Sheldon, who articulated several incidents where you assaulted her. In 1997 at your brother's residence. In 1996 again. She also referenced and incident where you threatened her with a firearm.
>
> After killing [the victim], you made no attempt to treat her, instead you chose to go to your brother's apartment and smoke crack cocaine. You left three children in the home with a – with the deceased victim.
>
> [Defendant], I am convinced that you threaten any woman you have a relationship with. For that reason and the others I just articulated, it is the sentence of this Court that you serve ten to 15 years with the Department of Corrections with credit for 342 days.

On a departure evaluation form, the trial court listed the following reasons for departure:

> 1. Verbally and physically victimizing [the victim] for several years
>
> 2. Multiple prior assaults on his girlfriend Monique Sheldon
>
> 3. Wanton and Willful leaving of the victim to die by going to and using drugs
>
> 4 Leaving three children with the dead corpse of their mother

5. Prior assaultive convictions

6. Overwhelming evidence he is and will continue to be a continuing threat to other people, especially any woman he has a relationship with.

The trial court relied on factors that are objective and verifiable, and the court did not abuse its discretion by finding that these factors amounted to substantial and compelling reasons to depart from the sentencing guidelines range. Defendant argues that the trial court impermissibly relied on factors already taken into account in the scoring of the guidelines. Defendant correctly notes that he was scored 15 points for offense variable (OV) 5 (psychological injury to a member of the victim's family), MCL 777.35(1)(a), 25 points for OV 6 (intent to kill or injure), and ten points for prior record variable (PRV) 5 (prior misdemeanor convictions), MCL 777.55(1)(c). Nonetheless, the trial court did not err by finding that the offense and offender characteristics that are unique to this voluntary manslaughter were not adequately reflected in the guidelines. Although the scoring for PRV 5 reflected that defendant had three or four prior misdemeanor convictions, as noted by the trial court, the guidelines did not adequately account for the many additional assaults committed by defendant over the years, the brutal nature and enduring and devastating consequences of this offense, or that the defendant committed this crime against his children's mother and callously left the victim's corpse at home with their young children while he left to use drugs. Further, the scoring of PRV 5 did not reflect that several of defendant's prior convictions involved domestic violence, which was at issue in this case.

Defendant challenges the trial court's conclusion that he is a threat to the public, particularly woman, as a basis for departure. Indeed, a trial court's general conclusion that a defendant is a danger is not, itself, an objective and verifiable factor. See *People v Solmonson*, 261 Mich App 657, 670; 683 NW2d 761 (2004). Here, however, it is apparent that the trial court did not simply conclude in general that defendant was a danger to society. Rather, the trial court based this finding on the specific objective circumstances surrounding defendant's past history of domestic violence against his girlfriends and the killing of the victim in this case, and concluded that those circumstances were not adequately accounted for in the scoring of the guidelines, thereby justifying an upward departure. The facts on which the trial court relied for its conclusion that defendant will be a continuing threat were external to the court's mind and were capable of being confirmed.

In sum, the objective and verifiable reasons justifying departure keenly and irresistibly grab one's attention and are of considerable worth in deciding the length of defendant's sentence.[4] Further, considering the violent manner in which the victim was killed and

[4] Even if we accept that the trial court improperly relied on defendant being a danger to the public as a reason for departure, resentencing is not warranted. If a trial court articulates multiple reasons for a departure, but some of the reasons are found to be invalid, this Court must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the valid reasons alone. *Babcock*, *supra* at 260, 273. If this Court cannot determine whether the trial court would have departed from the guidelines range to the same extent, remand for rearticulation or resentencing is necessary. *Id.* at 260-261. Having reviewed
(continued…)

defendant's prior assaultive history, the extent of the departure, 34 months, is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Babcock, supra* at 264, 272.

Defendant also argues that he must be resentenced because the facts supporting the trial court's upward departure were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), cert den ___ US ___; 127 S Ct 592; 166 L Ed 2d 440 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

(…continued)

the record and scrutinized the sentencing transcript, we are satisfied that the trial court would have imposed the same sentence on the basis of the valid factors alone, given that it is apparent that the court's conclusion that defendant was a danger to the public was a manifestation of the court's earlier objective and verifiable reasons for departure.